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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

REX LAIR, individually, and on behalf  
of all others similarly situated,

Plaintiff,

v.  
BANK OF AMERICA, N.A., and  
DOES 1 through 5, inclusive,

Defendants.

Case No. 5:23-cv-1345-WLH-SHK

**NOTICE OF MOTION AND  
MOTION TO DISMISS**

Date: October 27, 2023

Time: 1:30 PM

Dept: 9B

Judge: Hon. Wesley L. Hsu

Filed/Lodged Concurrently with:

1. [Proposed] Order

## **NOTICE OF MOTION AND MOTION TO DISMISS**

**TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

3 Please take notice that on October 27, 2023 at 1:30 p.m. or as soon thereafter  
4 as the matter can be heard in Courtroom 9B, 9th Floor, of the United States District  
5 Court located at 350 W. 1st Street, Los Angeles, California 90012, before the  
6 Honorable Judge Wesley L. Hsu, Defendant Bank of America, N.A. (“BANA”),  
7 will, and hereby does, move this Court for an order dismissing all claims asserted  
8 against it by Plaintiff Rex Lair in his Complaint, on behalf of himself and all others  
9 similarly situated, for failure to state a claim upon which relief can be granted under  
10 Fed. R. Civ. P. 12(b)(6) and for lack of subject matter jurisdiction under Fed. R.  
11 Civ. P. 12(b)(1) with respect to his claims for prospective injunctive relief.

12        The Motion is based upon this Notice and the Memorandum in support of  
13 this Motion, which are filed concurrently herewith, the complete file and records of  
14 this action, other documents of which this Court may take judicial notice, and such  
15 other oral and documentary evidence which this Court allows for presentation at the  
16 time of hearing.

17 This Motion is made following the conference of counsel pursuant to L.R. 7-  
18 3, which took place by teleconference on August 31, 2023 and during which the  
19 parties thoroughly discussed the substance and potential resolution of the Motion.

1 Dated: September 7, 2023

Respectfully submitted,

2  
3 By: /s/ Laura A. Stoll

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

Defendant Bank of America, N.A. (“BANA”) respectfully submits this Memorandum of Law in support of its Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

## **INTRODUCTION**

Plaintiff Rex Lair (“Plaintiff”) brings this California putative class action challenging BANA’s assessment of a \$15.00 fee for an incoming wire transfer to his checking account. The crux of Plaintiff’s claim is that BANA’s “governing account documents provided no indication that Bank of America assessed a specific fee for inbound wire transfers” and therefore “under no circumstances can Bank of America justify charging an incoming wire transfer fee.” ECF No. 1 (“Compl.”) ¶¶ 23-24. Plaintiff asserts claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) money had and received, (5) conversion, (6) violation of California’s Unfair Competition Law (“UCL”), and (7) violation of California’s False Advertising Law (“FAL”).

Despite Plaintiff’s inflammatory rhetoric, the Complaint mischaracterizes the Account Documents at issue.<sup>1</sup> The Account Documents, upon which Plaintiff relies, show that BANA disclosed, in multiple provisions and documents, that incoming wire transfers are subject to fees. The Account Documents further disclose that this fee can vary and notify accountholders how they can determine the exact amount of

<sup>1</sup> Plaintiff's relationship with BANA is governed in part by the Deposit Agreement and Disclosures ("Deposit Agreement") and accompanying Personal Schedule of Fees (collectively, the "Account Documents"). Compl. ¶ 15, Ex. 1 at 2 ("This Deposit Agreement and Disclosures, the applicable Schedule of Fees, the signature card and other account opening documents for your account are part of the binding contract between you and us."). Plaintiff relies upon and attaches the Deposit Agreement (effective November 10, 2022) and Personal Schedule of Fees (effective May 19, 2023), to the Complaint. Compl., Exs. 1-2. However, there are at least 11 other versions of the Deposit Agreement and 11 other versions of the Personal Schedule of Fees that were in effect during the relevant time period. These Deposit Agreements and Personal Schedule of Fees are identical to the versions Plaintiff attaches to the Complaint with respect to the relevant language discussed herein. As such, BANA will refer to the attached Deposit Agreement and Personal Schedule of Fees when citing applicable language.

1 the fee for any particular transaction. None of Plaintiff's claims stand in light of these  
 2 disclosures, and each fails for a myriad of other reasons.

3 First, Plaintiff's breach of contract claim fails because BANA's Account  
 4 Documents expressly permit incoming wire transfer fees and Plaintiff identifies no  
 5 contractual provision to the contrary. Second, Plaintiff's remaining claims all fail  
 6 because they allege nothing more than a breach of contract and so are mere  
 7 regurgitations of the failed contract claim.

8 Third, Plaintiff fails to state a claim as to any of those remaining claims for a  
 9 myriad of other reasons including, fundamentally, his failure to plausibly allege any  
 10 fraudulent, coercive, menacing, threatening, wrongful, unlawful, unfair or deceptive  
 11 conduct with respect to BANA's assessment of incoming wire transfer fees.

12 Finally, even if Plaintiff had stated a claim under the UCL or the FAL,  
 13 Plaintiff's claim for prospective injunctive relief must be dismissed for lack of  
 14 standing.

15 Accordingly, BANA requests dismissal of the Complaint in its entirety, with  
 16 prejudice.

### 17 **FACTUAL BACKGROUND**

18 Plaintiff, a California resident, maintains a personal checking account with  
 19 BANA. Compl. ¶¶ 3, 32. Plaintiff alleges that he received an incoming wire transfer  
 20 on May 31, 2023, in the amount of \$35,000, and was charged a corresponding \$15.00  
 21 incoming wire transfer fee. *Id.* ¶ 33. Plaintiff admits that BANA's Personal Schedule  
 22 of Fees discloses that the "fee varies" for "incoming" wire transfers. *Id.* ¶ 18 (citing  
 23 Compl., Ex. 2 at 13). The Personal Schedule of Fees further discloses that BANA  
 24 "may change the fees for wire transfers at any time" and that accountholders can  
 25 "[v]isit a financial center or call [BANA] at the number on [their] statement for  
 26 current fees." *Id.*

27 The Deposit Agreement attached to the Complaint further discloses that  
 28 "[BANA] may charge fees for sending or receiving a funds transfer," that it "may

1 deduct [its] fees from [the] account or the amount of the transfer,” and that “[f]or  
 2 current fees, [a cardholder can] call [BANA] at the number for customer service on  
 3 [the] statement or ask a financial center associate.” Compl., Ex. 1 at 67.  
 4 Furthermore, the Deposit Agreement states that cardholders “agree to pay for  
 5 [BANA’s] services in accordance with the fees that apply to [their] account and  
 6 [their] deposit relationship with [BANA],” that “[t]he Personal Schedule of Fees lists  
 7 account fees that apply to [BANA’s] personal deposit accounts,” and that “[BANA]  
 8 may change these fees at any time without notice.” *Id.* at 17.

9 Notwithstanding these disclosures, Plaintiff alleges in his Complaint that  
 10 BANA “breached its contracts and violated California consumer protection laws”  
 11 when it “charg[ed] recipients of wire transfers fees on incoming transfers without  
 12 properly disclosing such fees.” Compl. ¶ 1. Plaintiff seeks to certify a nationwide  
 13 class of “all California Bank of America personal accountholders who, during the  
 14 applicable statute of limitation period through the date of class certification, were  
 15 charged fees on incoming wire transfers.” *Id.* ¶ 37.

#### LEGAL STANDARD

17 “To survive a motion to dismiss, a plaintiff must allege ‘enough facts to state  
 18 a claim to relief that is plausible on its face.’” *W. Coast Hotel Mgmt., LLC v.*  
 19 *Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1237 (C.D. Cal. Oct.  
 20 27, 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff  
 21 must plead “more than labels and conclusions, and a formulaic recitation of the  
 22 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. And, “the  
 23 factual allegations that are taken as true must plausibly suggest an entitlement to  
 24 relief, such that it is not unfair to require the opposing party to be subjected to the  
 25 expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216  
 26 (9th Cir. 2011). In ruling on a 12(b)(6) motion for failure to state a claim, the Court  
 27 may consider the complaint’s allegations, “documents incorporated by reference in  
 28 the complaint, or matters of judicial notice.” *United States v. Ritchie*, 342 F.3d 903,

1 908 (9th Cir. 2003). However, “where the complaint incorporates exhibits, the court  
 2 should ignore the allegations in the complaint if they are in conflict with facts set  
 3 forth in the exhibit.” *Banga v. Allstate Ins. Co.*, 2011 WL 794847, at \*6 (E.D. Cal.  
 4 Mar. 1, 2011) (citing *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d  
 5 1542, 1555 n.19 (9th Cir. 1989)).

6 **ARGUMENT**

7 **I. Plaintiff’s Breach of Contract Claim (Count I) Should Be Dismissed**  
 8 **Because It Is Foreclosed By The Express Terms of the Account**  
 9 **Documents.**

10 Plaintiff’s claim for breach of contract rests entirely on the premise that  
 11 BANA’s “governing account documents provided no indication that Bank of  
 12 America assessed a specific fee for inbound wire transfers” and therefore BANA “did  
 13 not contract with Plaintiff to permit assessment of an incoming wire transfer fee.”  
 14 Compl. ¶¶ 23, 52. To plausibly state a breach of contract claim, a plaintiff must  
 15 allege both “the material terms of a specific contract” and “which obligations a  
 16 defendant allegedly breached.” *Langan v. United Servs. Auto. Ass’n*, 69 F. Supp. 3d  
 17 965, 980 (N.D. Cal. 2014). Plaintiff’s breach of contract claim fundamentally fails  
 18 because incoming wire transfer fees are allowed under the express language of the  
 19 Account Documents.

20 Plaintiff does not dispute that the Account Documents govern his claims, and  
 21 he attaches them to the Complaint. Compl. ¶ 15; *id.* Exs. 1, 2.<sup>2</sup> The Account  
 22 Documents permit incoming wire transfer fees and disclose that “[w]e may charge  
 23 fees for sending or receiving a funds transfer,” that “[w]e may deduct our fees from  
 24 your account or from the amount of the transfer,” and that for “Wire Transfers,  
 25 Incoming or Outgoing (U.S. or International)” the “Fee varies.” Compl., Ex. 1 at 67;  
 26 *id.*, Ex. 2 at 13. This language makes clear that BANA may charge an incoming wire

27  
 28 <sup>2</sup> This Court may take judicial notice of and consider the Account Documents  
 attached as exhibits to the Complaint in deciding this motion. See *Mendoza v.*  
*Amalgamated Transit Union Int’l*, 30 F.4th 879, 884 (9th Cir. 2022).

1 transfer fee. BANA further directs accountholders to call customer service or visit a  
 2 financial center to determine the exact amount of the fee because the amounts vary  
 3 based on the type of wire transfer (*e.g.*, incoming, outgoing, domestic, or  
 4 international). Compl., Ex. 1 at 67; *id.*, Ex. 2 at 13.

5 In an attempt to circumvent this clear language, Plaintiff baselessly alleges that  
 6 BANA “did not contract with Plaintiff to permit assessment of an incoming wire  
 7 transfer fee” because “[t]he [Deposit] Agreement states that [BANA] will charge fees  
 8 consistent with the Personal Fee Schedule” and “the Personal Fee Schedule does not  
 9 disclose a specific fee charge on incoming wire transfers.” Compl. ¶¶ 52-53. But as  
 10 Plaintiff himself admits, the Personal Schedule of Fees *did* disclose that incoming  
 11 wire transfers were subject to fees. *See* Compl. ¶ 18 (alleging that “[w]ith regard to  
 12 wire transfers ‘incoming or outgoing,’ the Personal Schedule of Fees [] states that the  
 13 ‘fee varies.’”) (citing Compl., Ex. 2 at 13). BANA therefore expressly had the  
 14 authority to assess fees for incoming wire transfers.

15 In a further attempt to avoid the clear terms of the Account Documents,  
 16 Plaintiff alleges that another document available on BANA’s website, the Online  
 17 Banking Agreement, does not specifically mention incoming wire transfer fees “in  
 18 what otherwise appears to be an exhaustive list of fees for transfers.” Compl. ¶¶ 19-  
 19 20. This allegation fails to state a claim for multiple independent reasons.

20 First, Plaintiff identifies no provision in the Online Banking Agreement stating  
 21 (or even indicating) that the Agreement includes “an exhaustive list of fees for  
 22 transfers.” Nor can he, because the Online Banking Agreement is limited to  
 23 transactions that can be initiated by an accountholder via an online or mobile banking  
 24 platform, such as *outgoing* wire transfers and incoming or outgoing *ACH*  
 25 *transactions*. Thus, only fees for those types of transactions appear within the Online  
 26 Banking Agreement—not fees for transactions such as incoming wire transfers that  
 27 cannot be initiated on those platforms. *See* Compl., Ex. 3 at Section 1 (“This  
 28 Agreement governs your use of any *online or mobile banking services* maintained by

1 Bank of America") (emphasis added). Plaintiff himself acknowledges that "[t]he  
 2 Online [Banking] Agreement governs the use of [BANA]'s online or mobile banking  
 3 services" and that the section on "ACH and Wire Transfers" covers only "inbound  
 4 and outbound ACH transfers and *outbound* domestic or international wire transfers."  
 5 *Id.* ¶ 19 (citing Compl., Ex. 3) (emphasis added). Likewise, the Wire Transfer  
 6 FAQs—located online and on the mobile banking platform—only provides  
 7 information related to how to "send a domestic or international wire transfer." *Id.*,  
 8 Ex. 4 ("Fees and limits may apply, depending on your account type and the type of  
 9 wire. You will be able to review any fees and limits *before completing your wire*  
 10 *transfer in Online Banking.*") (emphasis added).

11 Second, *even if* the Online Banking Agreement did apply to incoming wire  
 12 transfers (it does not), the omission of incoming wire transfer fees from that  
 13 document does not change the fact that BANA discloses incoming wire transfer fees  
 14 in the applicable Account Documents—the Deposit Agreement and Personal  
 15 Schedule of Fees. It also does not strip BANA of its contractual authority to assess  
 16 such fees, because, under California law, when several contracts relating to the same  
 17 subject matter are executed by the same parties, the contracts are "considered  
 18 together as if contained in a single document." *Ramirez v. Baxter Credit Union*, 2017  
 19 WL 118859, at \*3 (N.D. Cal. Jan. 12, 2017) (citation omitted). Indeed, "[u]nder  
 20 California law, parties may validly incorporate by reference into their contract the  
 21 terms of another document." *Slaught v. Bencomo Roofing Co.*, 25 Cal. App. 4th 744,  
 22 748-49 (1994). Here, the Online Banking Agreement incorporates by reference both  
 23 the Deposit Agreement and Personal Schedule of Fees. *See* Compl., Ex. 3 at 2. Thus,  
 24 read "as a whole," BANA's Account Documents plainly authorize BANA to charge  
 25 incoming wire transfer fees. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19  
 26 (1995) ("[L]anguage in a contract must be interpreted as a whole, and in the  
 27 circumstances of the case, and cannot be found to be ambiguous in the abstract.  
 28 Courts will not strain to create an ambiguity where none exists.") (citations omitted).

1       Because BANA’s Account Documents expressly permit incoming wire  
 2 transfer fees and Plaintiff identifies no contractual provision to the contrary, Plaintiff  
 3 has not (and cannot) plausibly allege that any breach occurred. As such, Plaintiff’s  
 4 breach of contract claim must be dismissed. *See Zamora v. Solar*, 2016 WL 3512439,  
 5 at \*3 (C.D. Cal. June 27, 2016) (“The Court agrees with Defendant’s plain reading  
 6 of the Agreement, and joins its sister courts in the California system in holding that  
 7 a party cannot breach a contract if its [conduct] was expressly permitted by the  
 8 contract’s terms.”); *Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th  
 9 342, 374 (1992) (“[I]f defendants were given the right to do what they did by the  
 10 express provisions of the contract there can be no breach.”).

11 **II. Plaintiff’s Remaining Claims Are Merely Attempts to Rehash The Failed**  
 12 **Breach of Contract Claim And Must Be Dismissed.**

13       Each of Plaintiff’s remaining claims are premised on the same allegation  
 14 underlying his breach of contract claim: that BANA improperly assessed incoming  
 15 wire transfer fees. Accordingly, each of these claims must be dismissed.

16       In Count II, Plaintiff alleges that BANA “breached the implied covenant of  
 17 good faith and fair dealing by, *inter alia*, charging undisclosed incoming wire transfer  
 18 fees,” and seeks damages for these fees. Compl. ¶¶ 65-66. Because Plaintiff’s  
 19 implied covenant claim cites the “same underlying breach” as his claim for breach of  
 20 contract and seeks the same relief, it is impermissibly “superfluous” and should be  
 21 dismissed. *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 716 (N.D. Cal.  
 22 2014); *accord Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371,  
 23 1395 (1990) (“If the allegations [for breach of the implied covenant] do not go  
 24 beyond the statement of a mere contract breach and, relying on the same alleged acts,  
 25 simply seek the same damages or other relief already claimed in a companion  
 26 contract cause of action, they may be disregarded as superfluous as no additional  
 27 claim is actually stated.”); *Malcolm v. JPMorgan Chase Bank, N.A.*, 2010 WL  
 28 934252, at \*6 (N.D. Cal. Mar. 15, 2010) (same).

1        In Count III, Plaintiff alleges that BANA was unjustly enriched “[b]ecause  
 2 Plaintiff and Class Members paid incoming wire transfer fees.” Compl. ¶ 69. But  
 3 “[u]njust enrichment is an action in quasi-contract, which does not lie when an  
 4 enforceable, binding agreement exists defining the rights of the parties.” *Schertzer*  
 5 *v. Bank of America, N.A.*, 489 F. Supp. 3d 1061, 1076 (S.D. Cal. 2020) (quoting  
 6 *Paracor Fin., Inc. v. GE Cap. Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996)). Thus,  
 7 before analyzing the elements of an unjust enrichment claim, the court “must satisfy  
 8 itself that no contract already governs the relevant relationship between the parties.”  
 9 *Schertzer*, 489 F. Supp. 3d at 1077. Here, Plaintiff admits that his relationship with  
 10 BANA is governed by the Account Documents. Compl. ¶ 15. Accordingly the unjust  
 11 enrichment claim must be dismissed. *See Schertzer*, 489 F. Supp. 3d at 1077  
 12 (dismissing unjust enrichment claim regarding defendant’s assessment of ATM fees  
 13 because the dispute was covered by “a valid and enforceable written agreement”); *In*  
 14 *re Facebook PPC Adver. Litig.*, 709 F. Supp. 2d 762, 770 (N.D. Cal. 2010)  
 15 (dismissing unjust enrichment claim premised on same allegations as a breach of  
 16 contract because the remedy “applies only in the absence of an adequate remedy at  
 17 law” ).

18        In Count IV, Plaintiff alleges that as a result of assessing incoming wire  
 19 transfer fees, BANA “has in its possession money which, in equity, belongs to  
 20 Plaintiff and the Class Members” in violation of the money had and received doctrine.  
 21 Compl. ¶¶ 71-72. But where, as here, the relationship between the parties is governed  
 22 by an express contract, a claim for money had and received will not lie unless there  
 23 has been “total failure of consideration.” *Rutherford Holdings, LLC v. Plaza Del*  
 24 *Rey*, 223 Cal. App. 4th 221, 230 (2014). Plaintiff does not (and cannot) allege any  
 25 (let alone a total) failure of consideration here. To the contrary, Plaintiff’s entire  
 26 theory is premised on the allegation that the Account Documents are enforceable.  
 27 *See* Compl. ¶ 15. Accordingly, because “there is an enforceable, binding agreement  
 28 that exists to define the rights of the parties,” and Plaintiff’s “claim for money had

1 and received is based on the same facts as his claim for breach of contract,” he “fails  
 2 to allege facts sufficient for an independent remedy in quasi-contract.” *Friedman v.*  
 3 *U.S. Bank Nat'l Ass'n*, 2016 WL 3226005, at \*8 (C.D. Cal. June 6, 2016) (citation  
 4 omitted). The claim for money had and received thus should be dismissed.

5 In Count V, Plaintiff alleges that by assessing incoming wire transfer fees,  
 6 BANA engaged in conversion because it “received profits to which it was not entitled  
 7 at the expense of Plaintiff and the Class Members.” Compl. ¶ 74. The conversion  
 8 claim is barred by the economic loss doctrine. Under the doctrine, “[a] person may  
 9 not ordinarily recover in tort for the breach of duties that merely restate contractual  
 10 obligations.” *Motivo Eng'g, LLC v. Black Gold Farms*, 2022 WL 3013227, at \*4  
 11 (C.D. Cal. June 27, 2022) (citation omitted). Where, as here, “the ownership interest  
 12 that formed the basis for the conversion claim [] arises from the contract,” the claim  
 13 is barred by the economic loss rule. *Id.*; *Durkee v. Bank of America, N.A.*, 2020 WL  
 14 4500607, at \*4 (S.D. Cal. Aug. 5, 2020) (dismissing conversion claim that “relie[d]  
 15 on the same factual allegations as [the plaintiff's] breach of contract claim”); *Lum v.*  
 16 *Merlin Ents. Grp. U.S. Holdings Inc.*, 2023 WL 2583307, at \*6, \*13 (S.D. Cal. Mar.  
 17 20, 2023) (dismissing conversion claim where the claim “fails to assert damages  
 18 beyond the contract”).

19 In Count VI, Plaintiff alleges that BANA violated the UCL through its  
 20 “misrepresentations and omissions about its fee policies related to incoming wire  
 21 transfers” and “fail[ure] to disclose the amount of the incoming wire transfer fee or  
 22 the conditions under which the fee is imposed in its contracts.” Compl. ¶¶ 81-82.  
 23 But it is well settled that, absent factual allegations of conduct beyond a mere breach  
 24 of contract, Plaintiff cannot state a claim for violation of the UCL. *See, e.g., Caltex*  
 25 *Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1161 (9th Cir. 2016)  
 26 (affirming dismissal of UCL claim based on factual allegations amounting to nothing  
 27 more than breach of contract); *Forever 21, Inc. v. Nat'l Stores Inc.*, 2014 WL 722030,  
 28 at \*5 (C.D. Cal. Feb. 24, 2014) (dismissing UCL claim where “the allegations are

merely a repackaged version of . . . [a] defective breach-of-contract claim"); *Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1152 (9th Cir. 2008) (dismissing UCL claim where plaintiff's claim amounted to a breach of contract and plaintiff "ha[d] not pled that the breaches of contract [were] independently unlawful, [or] unfair"); *Nuovo Rsch. Inc. v. McGrath*, 2012 WL 1965870, at \*6 (N.D. Cal. May 31, 2012) (dismissing UCL claim that was "predicated solely on rights emanating from the [parties'] Agreement"). This claim therefore must be dismissed.

Finally, in Count VII, Plaintiff alleges that BANA violated the FAL when it "misrepresented its true fee policies and failed to accurately disclose that Plaintiff and Class Members could be charged \$15 fees for incoming wire transfers" and disseminated those misrepresentations "*through Bank of America's contracts and other disclosures.*" Compl. ¶¶ 92-93 (emphasis added). This claim fails for the simple reason that the FAL does not apply to statements made in contracts. *Lit'l Pepper Gourmet, Inc. v. Airgas USA, LLC*, 2019 U.S. Dist. LEXIS 203437, at \*14 (S.D. Cal. Nov. 21, 2019) ("Although the definition of 'advertising' in section 17500 is expansive and includes 'any [ ] manner or means whatsoever, . . . [the statute] as a whole clearly refers to advertising,' *not to contracts.*") (emphasis added) (citation omitted).

At bottom, Plaintiff's claims in Counts II-VII are merely repackaged versions of Plaintiff's defective breach of contract claim. Each of these claims must be dismissed.

### III. **Plaintiff's Remaining Claims Fail for Additional Reasons.**

Even if Plaintiff's remaining claims were premised on more than mere breaches of contract (they are not), those claims fail for the additional, independent reasons described below.

#### A. **Plaintiff Does Not State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II)**

Plaintiff alleges that BANA breached the implied covenant of good faith and

1 fair dealing when it “charg[ed] undisclosed incoming wire transfer fees.” Compl.  
 2 ¶ 65. But Plaintiff cannot use the implied covenant to override the express provisions  
 3 in the Account Documents *allowing* incoming wire transfer fees. *See Guz v. Bechtel*  
 4 *Nat'l, Inc.*, 24 Cal. 4th 317, 349 (2000) (The covenant exists “to prevent one  
 5 contracting party from unfairly frustrating the other party’s right to receive *the*  
 6 *benefits of the agreement actually made.*”) (emphasis in original). This is because  
 7 the implied covenant “cannot be endowed with an existence independent of its  
 8 contractual underpinnings.” *Lenk v. Monolithic Power Sys., Inc.*, 2015 WL 7429498,  
 9 at \*3 (N.D. Cal. Nov. 23, 2015) (citation omitted). Nor can the implied covenant  
 10 “impose substantive duties or limits on the contracting parties beyond those  
 11 incorporated in the specific terms of their agreement.” *Guz*, 24 Cal. 4th at 349-50;  
 12 *Racine & Laramie, Ltd., Inc. v. Dep’t of Parks & Recreation*, 11 Cal. App. 4th 1026,  
 13 1032 (1992) (same). Accordingly, because the Account Documents granted BANA  
 14 the authority to assess incoming wire transfer fees, this claim fails.

15 **B. Plaintiff Does Not State a Claim for Unjust Enrichment (Count  
 16 III)**

17 Plaintiff alleges that BANA was unjustly enriched because by wrongfully  
 18 assessing incoming wire transfer fees, “Bank of America unjustly received profits at  
 19 the expense of Plaintiff and the Class Members.” Compl. ¶ 68. As an initial matter,  
 20 “most California courts agree that there is no cause of action in California for unjust  
 21 enrichment.” *Lopez v. Wash. Mut. Bank, F.A.*, 2010 WL 1558938, at \*11 (E.D. Cal.  
 22 Apr. 19, 2010) (citing cases); *accord Bosinger v. Belden CDT, Inc.*, 358 F. App’x  
 23 812, 815 (9th Cir. 2009) (“In California there is no cause of action for unjust  
 24 enrichment”). That is because “[u]njust enrichment is a general principle, underlying  
 25 various legal doctrines and remedies, rather than a remedy itself.” *Lopez*, 2010 WL  
 26 1558938, at \*11 (citation omitted).

27 Even if this Court were to recognize an unjust enrichment claim, Plaintiff fails  
 28 to state a claim. To successfully plead an unjust enrichment claim, a plaintiff must

1 demonstrate the “receipt of a benefit and [the] unjust retention of the benefit at the  
 2 expense of another.” *Kahn Creative Partners, Inc. v. Nth Degree, Inc.*, 2011 WL  
 3 1195680, at \*9 (C.D. Cal. Mar. 29, 2011) (citation omitted). However, “the mere  
 4 fact that a person benefits another is not of itself sufficient to require the other to  
 5 make restitution therefor.” *Lopez*, 2010 WL 1558938, at \*10 (citation omitted).  
 6 Rather, the plaintiff “must show that a benefit was conferred on the defendant through  
 7 mistake, fraud, coercion, or request.” *Schertzer*, 489 F. Supp. 3d at 1076.

8 Here, Plaintiff has not (and cannot) plead any plausible mistake, fraud,  
 9 coercion or request through which incoming wire transfer fees were paid because  
 10 BANA’s Account Documents unequivocally permit BANA to assess incoming wire  
 11 transfer fees and BANA therefore was entitled to those fees. *See supra* Section I;  
 12 *Lopez*, 2010 WL 1558938, at \*10 (“The complaint’s unjust enrichment claim fails  
 13 because the complaint fails to state any facts in support of the contention that  
 14 Defendants received and retained benefits and payments to which they were not  
 15 entitled.”); *Khomich v. Bank of America, N.A.*, 2011 WL 1087858, at \*9 (E.D. Cal.  
 16 Mar. 23, 2011) (same). As a result, Plaintiff has not stated a claim for unjust  
 17 enrichment.

18 **C. Plaintiff Does Not State a Claim for Money Had and Received  
 19 (Count IV)**

20 In his claim for money had and received (Count IV), Plaintiff alleges that  
 21 because BANA assessed incoming wire transfer fees, “[BANA] has obtained money  
 22 from Plaintiff and the Class Members by the exercise of undue influence, menace or  
 23 threat, compulsion or duress, and/or mistake of law and/or fact.” Compl. ¶ 71. To  
 24 state a claim for money had and received, a plaintiff must plausibly allege that (1)  
 25 the defendant received money that was intended to be used for the benefit of the  
 26 plaintiff; (2) the money was not used for the benefit of the plaintiff; and (3) the  
 27 defendant has not given the money to the plaintiff. *Gilbert v. Chase Home Fin. LLC*,  
 28 2013 WL 3968229, at \*8 (E.D. Cal. July 31, 2013). A claim for money had and

1 received is not a standalone claim but rather a “common count,” which is used as “an  
 2 alternative claim seeking the same recovery demanded in a cause of action based on  
 3 the same facts.” *Compliance Servs. of America, LLC v. Houser Holdings, LLC*, 2013  
 4 WL 4169119, at \*7 (N.D. Cal. Aug. 9, 2013). Accordingly, a claim for money had  
 5 and received will not survive if the underlying causes of action on which it is  
 6 premised do not survive. *See McBride v. Boughton*, 123 Cal. App. 4th 379, 394  
 7 (2004); *Mar Partners 1, LLC v. Am. Home Mortg. Servicing, Inc.*, 2011 WL 11501,  
 8 at \*4 (N.D. Cal. Jan. 4, 2011).

9       Here, Plaintiff’s claim for money had and received is duplicative of his unjust  
 10 enrichment and conversion claims. *See* Compl. ¶¶ 68-69 (alleging that BANA  
 11 engaged in unjust enrichment when it “unjustly received profits at the expense of  
 12 Plaintiff and the Class Members”); *id.* ¶¶ 71-72 (alleging that BANA violated the  
 13 money had and received doctrine when it “obtained money from Plaintiff and the  
 14 Class Members by exercise of undue influence, menace or threat, compulsion or  
 15 duress, and/or mistake of law and/or fact” and as a result, “has in its possession  
 16 money which, in equity, belongs to Plaintiff and the Class Members”); *id.* ¶ 74  
 17 (alleging that BANA engaged in conversion when, as a result of assessing incoming  
 18 wire transfer fees, it “received profits to which it was not entitled at the expense of  
 19 Plaintiff and the Class Members”). Plaintiff’s claim for money had and received  
 20 therefore fails along with the unjust enrichment and conversion claims.

21       **D. Plaintiff Does Not State a Claim for Conversion (Count V)**

22       Plaintiff claims that by assessing incoming wire transfer fees, “[BANA]  
 23 received profits to which it was not entitled at the expense of Plaintiff and the Class  
 24 Members” and that “[b]y retaining these profits for itself, [BANA] has maintained  
 25 wrongful possession and control over Plaintiff’s and the Class Members’ property.”  
 26 Compl. ¶¶ 74, 75. To state a claim for conversion, or “the wrongful exercise of  
 27 dominion over the property of another,” a plaintiff must plausibly allege (1) “the  
 28 plaintiff’s ownership or right to possession of the property at the time of the

1 conversion,” (2) the defendant’s “wrongful act or disposition of property rights” to  
 2 assume control or ownership of the property or apply it to the defendant’s own use,  
 3 and (3) damages. *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 451-52 (1997).

4 This claim fails because it is well-settled under California law that fees  
 5 assessed in connection with funds transferred or deposited into a deposit account may  
 6 not be the subject of conversion. *See, e.g., Schertzer*, 445 F. Supp. 3d at 1093  
 7 (dismissing claim premised on ATM fees charged by bank because “[a]ny money  
 8 became the literal property of BofA upon deposit in the bank and not subject to a  
 9 claim of conversion” and thus “[a]ny injuries or losses the Plaintiffs have allegedly  
 10 suffered are a result of their pre-existing contractual agreement with BofA, the bank  
 11 into which they deposited their funds”) (citation omitted); *Gutierrez v. Wells Fargo*  
 12 *Bank N.A.*, 622 F. Supp. 2d 946, 956 (N.D. Cal. 2009) (“A bank may not be sued for  
 13 conversion of funds deposited with the bank.”); *Lawrence v. Bank of America*, 163  
 14 Cal. App. 3d 431, 437 n.2 (1985) (“money on deposit with a bank may not be the  
 15 subject of conversion.”) (citation omitted); *Chavez v. Bank of America Corp.*, 2012  
 16 WL 1594272, at \*11 (N.D. Cal. May 4, 2012) (“California law is well-settled in this  
 17 area that a claim against the bank for conversion will not lie.”).

18 Even if conversion did apply to Plaintiff’s allegations (it does not), Plaintiff  
 19 has not and cannot plausibly allege that BANA obtained the incoming wire transfer  
 20 fees by a “wrongful act” because those fees were expressly permitted by the Account  
 21 Documents. *See supra* Section I; *Durkee v. Bank of America, N.A.*, 2020 WL  
 22 4500607, at \*4 (S.D. Cal. Aug. 5, 2020) (“The court has already determined that  
 23 Bank of America’s assessment of the [international transaction fee] was within the  
 24 terms of the contract so Plaintiff cannot allege that the fee was obtained ‘by a  
 25 wrongful act.’”). As such, Plaintiff’s conversion claim must be dismissed.

26 **E. Plaintiff Does Not State a Claim Under the UCL (Count VI) or the**  
 27 **FAL (Count VII)**

28 Plaintiff asserts claims under the “unlawful” and “unfair” prongs of the UCL

1 and under the FAL. Compl. ¶¶ 81-83, 90-95. Plaintiff's UCL and FAL claims fail  
 2 because: (1) Plaintiff has an adequate remedy at law; and (2) Plaintiff does not plead  
 3 facts sufficient to state a UCL or FAL claim.

4       1. Plaintiff Has An Adequate Remedy at Law.

5       “As the California Supreme Court recently confirmed, ‘civil causes of action  
 6 authorized by the UCL and FAL must properly be considered equitable, rather than  
 7 legal, in nature.’” *Williams v. Apple, Inc.*, 2020 WL 6743911, at \*9 (N.D. Cal. Nov.  
 8 17, 2020) (quoting *Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda  
 9 Cty.*, 9 Cal. 5th 279, 326 (Cal. 2020)). “One limit on a federal court’s equitable  
 10 powers is that ‘equitable relief is not appropriate where an adequate remedy exists at  
 11 law.’” *Id.* (citing *Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009)).  
 12 Thus, a plaintiff “must establish that []he lacks an adequate remedy at law before  
 13 securing equitable restitution for past harm.” *Sonner v. Premier Nutrition Corp.*, 971  
 14 F.3d 834, 844 (9th Cir. 2020); *Williams*, 2020 WL 6743911, at \*9 (“[A] federal court  
 15 cannot grant relief under the UCL or FAL if Plaintiffs have an adequate remedy at  
 16 law”).

17       Where, as here, Plaintiff seeks money damages under “claims for breach of  
 18 contract or breach of the implied covenant of good faith and fair dealing, []he has an  
 19 adequate remedy at law.” *Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1203 (N.D.  
 20 Cal. 2016); *Williams*, 2020 WL 6743911, at \*10 (“[T]he Court must dismiss  
 21 Plaintiffs’ FAL and UCL claims, which necessarily seek equitable relief, because  
 22 Plaintiffs’ breach of contract claim provides an adequate remedy at law.”). This “is  
 23 the case even if all of [Plaintiff’s] [underlying] claims ultimately fail.” *Moss*, 197 F.  
 24 Supp. 3d at 1203.

25       Plaintiff’s claim for “public injunctive relief” (see Compl. ¶ 87) does not  
 26 change this result as “Plaintiffs are required to allege that they lack an adequate  
 27 remedy at law in order to seek injunctive relief.” *In re MacBook Keyboard Litig.*,  
 28 2020 WL 6047253, at \*3 (N.D. Cal. Oct. 13, 2020) (citing numerous cases); *Kumar*

1        *v. Ally Fin. Inc.*, 2022 WL 16962283, at \*4 (C.D. Cal. Oct. 17, 2022) (just because a  
 2 plaintiff “is also seeking injunctive relief … does not absolve him of the initial  
 3 requirements for seeking equitable relief — i.e. that Plaintiff lacks an adequate  
 4 remedy at law”). Accordingly, the Court should dismiss Plaintiff’s UCL and FAL  
 5 claims with prejudice. *See Gomez v. Jelly Belly Candy Co.*, 2017 WL 8941167, at  
 6 \*1 (C.D. Cal. Aug. 18, 2017) (dismissing FAL and UCL claims because plaintiff  
 7 failed to allege lack of an adequate remedy under the law).

8            2.        Plaintiff Has Not Properly Pled a Claim Under Any Prong of the  
 9            UCL or the FAL.

10          Dismissal of the UCL and FAL claims is also warranted because Plaintiff has  
 11 not plausibly alleged that there was anything “unlawful” or “unfair” about BANA’s  
 12 practice of charging incoming wire transfer fees, or that BANA made any  
 13 misrepresentation.

14          As to the “unlawful” UCL claim, Plaintiff cannot state a claim under any  
 15 predicate law, and so, this claim must be dismissed. “Section 17200 ‘borrows’  
 16 violations from other laws by making them independently actionable as unfair  
 17 competitive practices.” *Nikoopour v. Ocwen Loan Servicing, LLC*, 2018 WL  
 18 3007918, at \*5 (S.D. Cal. June 14, 2018) (citation omitted). “If a plaintiff cannot  
 19 state a claim under the predicate law, however, [the UCL] claim also fails.” *Hadley*  
 20 *v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1094 (N.D. Cal. 2017) (citation omitted).  
 21 Plaintiff alleges that BANA violated the UCL’s unlawful prong insofar as BANA  
 22 allegedly violated the FAL by “provid[ing] misleading information to Plaintiff and  
 23 Class Members regarding its true fee practices.” Compl. ¶ 81. Plaintiff’s failure to  
 24 state a claim under the FAL, as discussed in this Section *infra*, requires dismissal of  
 25 Plaintiff’s “unlawful” UCL claim. *See Nikoopour*, 2018 WL 3007918, at \*5  
 26 (dismissing UCL claim premised on failed breach of contract claim); *Hadley*, 243 F.  
 27 Supp. 3d at 1094-95 (dismissing UCL claim where plaintiff failed to adequately  
 28 allege any predicate violation).

1 Plaintiff also premises his “unlawful” UCL claim on BANA’s alleged  
 2 violation of the Truth In Savings Act (“TISA”). Compl. ¶ 82 (alleging BANA  
 3 violated TISA because BANA “both fails to disclose the amount of the incoming  
 4 wire transfer fee or the conditions under which the fee is imposed in its contracts”).  
 5 This claim fails because Plaintiff has not (and cannot) plausibly state a claim for an  
 6 underlying TISA violation. Contrary to Plaintiff’s assertions, TISA does not require  
 7 the disclosure of an exact fee amount so long as the bank discloses “an explanation  
 8 of how the fee will be determined” and “the conditions under which the fee may be  
 9 imposed.” 12 C.F.R. § 1030.4(b)(4). Here, BANA makes those disclosures in its  
 10 Account Documents. *See* Compl., Ex. 1, at 67. Plaintiff’s UCL claim predicated on  
 11 a purported TISA violation therefore fails. *See Rodrigues v. Alliant Credit Union*,  
 12 2022 WL 2390999, at \*14 (N.D. Cal. July 1, 2022) (dismissing claim where  
 13 “[plaintiff] has failed to state an underlying TISA violation that supports a UCL  
 14 ‘unlawfulness’ claim”).

15 As to the “unfair” UCL claim, Plaintiff fails to plausibly allege that BANA’s  
 16 conduct “offends an established public policy” or “is immoral, unethical, oppressive,  
 17 unscrupulous or substantially injurious to consumers.” *Chavez v. Carmax Auto*  
 18 *Superstores Cal., LLC*, 2013 WL 12474697, at \*6 (C.D. Cal. Sept. 10, 2013). “[A]n  
 19 act or practice is unfair if the consumer injury is substantial, is not outweighed by  
 20 any countervailing benefits to consumers or to competition, and is not an injury the  
 21 consumers themselves could reasonably have avoided.” *Schertzer*, 445 F. Supp. 3d  
 22 at 1091. The inquiry is governed by the “reasonable consumer test” which “requires  
 23 that [a] plaintiff demonstrate more than the mere possibility that the provisions of the  
 24 Agreement ‘might conceivably be misunderstood by some few consumers viewing it  
 25 in an unreasonable manner.’” *Id.* at 1086-87 (quoting *Ebner v. Fresh*, 838 F.3d 958,  
 26 965 (9th Cir. 2016)). Here, Plaintiff’s conclusory allegation that “Bank of America’s  
 27 unfair business practices as alleged herein are immoral, unethical, oppressive,  
 28 unscrupulous, unconscionable, and/or substantially injurious” is nothing more than

1 the mere “stringing together of a handful of adjectives to describe [defendant’s]  
 2 behavior” and does not state a claim. *Schertzer*, 445 F. Supp. 3d at 1091.

3 Moreover, as demonstrated above, BANA’s Account Documents put Plaintiff  
 4 on notice that incoming wire transfers are subject to fees, that this fee varies, and that  
 5 accountholders can contact BANA to ascertain the exact fee that would apply to a  
 6 particular transaction. *See supra* Section I. Conduct cannot be “unfair” under the  
 7 UCL if it was permitted by the plain terms of the parties’ contract, as “the unfairness  
 8 prong of [the UCL] does not give the courts a general license to review the fairness  
 9 of contracts.” *Roots Ready Made Garments Co., W.L.L. v. Gap, Inc.*, 405 F. App’x  
 10 120, 122–23 (9th Cir. 2010) (quotations and citations omitted); *Quattrocchi v.*  
 11 *Allstate Indem. Co.*, 2018 WL 347779, at \*2 (E.D. Cal. Jan. 9, 2018), *aff’d*, 775 F.  
 12 App’x 330 (9th Cir. 2019). Accordingly, Plaintiff’s “unfair” UCL claim should be  
 13 dismissed. *See, e.g., Schertzer*, 445 F. Supp. 3d at 1087 (dismissing “unfair UCL  
 14 claim; “[b]ecause the possibility of being charged a balance inquiry fee has been  
 15 disclosed, the UCL claim lacks merit” and “[d]isclosure of this information would  
 16 not lead the hypothetical reasonable consumer to conclude that no [such] fees would  
 17 be charged”); *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1170-71 (9th Cir.  
 18 2012) (affirming dismissal where “nothing in the FAC supports the conclusion that  
 19 the advertisements were against public policy, immoral, unethical, oppressive, or  
 20 unscrupulous,” the advertisements at issue warned that “other restrictions might  
 21 apply,” and the at-issue annual fee was disclosed during the application process).

22 Plaintiff likewise fails to plausibly allege a violation of the FAL. Under the  
 23 FAL, it is unlawful for any person to “induce the public to enter into any obligation”  
 24 based on a statement that is “untrue or misleading, and which is known, or which by  
 25 the exercise of reasonable care should be known, to be untrue or misleading.” *Davis*,  
 26 691 F.3d at 1161. To determine whether an advertisement is misleading, the court  
 27 must evaluate the advertisement under a “reasonable consumer standard,” where a  
 28 plaintiff must “show that members of the public are likely to be deceived.” *Williams*

1 *v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Here, Plaintiff's claim fails  
2 because Plaintiff has not, and cannot, plausibly allege any affirmative  
3 misrepresentations regarding BANA's practice of assessing incoming wire transfer  
4 fees that would be likely to deceive a reasonable consumer in light of the disclosures  
5 about this fee in its Account Documents. *See supra* Section I; *Larin v. Bank of*  
6 *America, N.A.*, 617 F. App'x 651, 652 (9th Cir. 2015) (dismissing claim where "Bank  
7 of America's Overdraft Protection Program contains "no affirmative  
8 misrepresentations . . . that would likely deceive a reasonable consumer" and the  
9 Program "worked in the manner disclosed in the Deposit Agreement"); *Janda v. T-*  
10 *Mobile, USA, Inc.*, 2009 WL 667206, at \*21 (N.D. Cal. Mar. 13, 2009) (dismissing  
11 claim where the terms and conditions "disclose[d] the fact that [defendant] would  
12 charge [certain] fees, that they are discretionary, and that they might increase at any  
13 time without notice").

14 Because Plaintiff fails to state a claim under either the UCL or the FAL, Counts  
15 VI and VII must be dismissed.<sup>3</sup>

## **CONCLUSION**

17 For all the foregoing reasons, BANA respectfully requests that the Court

<sup>3</sup> Even if this Court were to find that Plaintiff stated a UCL or FAL claim (he has not), Plaintiff lacks standing to seek prospective injunctive relief under either claim. Under Rule 12(b)(1), a party may move to dismiss relief sought by a plaintiff based on lack of Article III standing, because “[s]tanding must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (citation omitted). Here, Plaintiff has not demonstrated a likelihood that he will suffer a repeated injury as a result of BANA’s alleged conduct, and nor can he as he admittedly “now know[s]” of the incoming wire transfer fee. *See Schertzer*, 445 F. Supp. 3d at 1075 (dismissing claims for injunctive relief under UCL and FAL where plaintiffs “failed to adequately allege an actual or imminent risk of future harm ... knowing the information that they now know”); *accord Freeman v. ABC Legal Servs., Inc.*, 877 F. Supp. 2d 919, 928-29 (N.D. Cal. 2012) (dismissing claim for injunctive relief under the UCL where named plaintiffs failed to “allege[] any facts to show that they personally have a reasonable threat of facing future [harm]”); *Ketayi v. Health Enrollment Grp.*, 516 F. Supp. 3d 1092, 1129 (S.D. Cal. 2021) (dismissing claim for injunctive relief under the UCL and FAL where “Plaintiffs [] have not alleged that they, as opposed to unnamed other consumers, face a threat of future harm from Defendants’ business practices”). Accordingly, should this Court find that Plaintiff stated a UCL or FAL claim, Plaintiff’s claims for injunctive relief should be dismissed.

1 dismiss the Complaint in its entirety with prejudice.  
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4 Dated: September 7, 2023

Respectfully submitted,

5 By: /s/ Laura A. Stoll

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## **CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Bank of America, N.A., certifies that this brief contains 6,752 words, which complies with the word limit of L.R. 11-6.1.

Executed: September 7, 2023

/s/ Laura A. Stoll

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the clerk of the court for the United States District Court for the Central District of California by using the CM/ECF system on September 7, 2023. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I certify under penalty of perjury that the foregoing is true and correct.

Executed: September 7, 2023 /s/ *Laura A. Stoll*